IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 84

MIKE LA JOY,

v.

UNITED STATES OF AMERICA,

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITIONER'S REPLY TO THE BRIEF FOR THE UNITED STATES IN OPPOSITION

The Petitioner La Joy considers that matters have occurred which require the attention of the Court, and therefore this reply to the brief of the United States in opposition to the grant of certiorari is necessary.

I.

The Petitioner has argued that the only evidence indicating his presence and participation in the robbery of the bank involved was the claimed voice identification evidence acquired by the unlawful line-up.

Petitioner LaJoy's features and person were never identified by anyone present at the bank, and there is only the claimed identification of his voice by a man who said he heard it once during the stress of a hold-up in which he was admittedly nervous and frightened, and once again in the line-up, and never after that. Other than this, there was no evidence to indicate LaJoy's presence and participation in the crime in the Franklin Park Bank.

Thus, had the District Court decided the Petitioner LaJoy's objections to the line up testimony and properly decided the Motion to Suppress that evidence, LaJoy could not have been convicted. If the Seventh Circuit Court of Appeals had decided his case properly, and in accordance with the law stated by this court in *United States* v. *Wade,* No. 334, October Term 1966, decided June 12, 1967, and *Gilbert* v. *State of California,* No. 223, October Term 1966, also decided June 12, 1967, these proceedings would not exist. Those two lower courts erred on the line-up question, and the United States now seeks to maintain the erroneous judgments of these two lower courts to confine LaJoy for 15 years.

The Government's blithe treatment of the effect of the Wade and Gilbert decisions totally ignores other elements of unlawfulness which entered into the line-up in the case at bar and relies on *Stovall* v. *Denno,* also decided June 12, 1967 as No. 254, October Term 1966. The Government seeks to interpret *Stovall* v. *Denno* as an unreserved ap-

proval and endorsement by this court of every line-up prior to June 12, 1967, without regard for the variations and unlawfulness of such line-ups.

The Petitioner LaJoy therefore reminds the court that his Petition for Certiorari presents additional questions regarding the violation of Rule 9 of the Federal Rules of Criminal Procedure, and the failure to afford LaJoy the opportunity to make bail already fixed by the court upon his indictment, by not informing him that bail had been set. LaJoy, who was established as being a respectable grocer and was arrested in his suburban home at 5:00 A.M. where he and his wife and three children lived, made the very high bail set by the court when given the opportunity. (See Gov. Brief P. 8). Did not the failure to inform him of the order setting his bail, and failure to produce him to persons who could take bail violate LaJoy's Eighth Amendment rights? Of course, a lawyer would secure these rights.

It is respectfully submitted that this court should review the erroneous decision of the Court of Appeals affirming the erroneous decision of the United States District Court.

II.

LaJoy was subjected to the line-up in the case at bar on September 27, 1963. In *Gilbert* v. *State of California*, the line-up occurred March 26, 1964. In *United States* v. *Wade*, the line-up occurred about May 10, 1964.

In all three cases, the denial of counsel after indictment was raised in the District Court and asserted in the respective courts of appeal. LaJoy also raised the additional questions referred to above.

Except for delays caused by court calendar incidents, LaJoy would have been before this court for decision on his application for certiorari before Gilbert and Wade were argued.

If the United States had promptly answered LaJoy's Petition for Certiorari, the question of its grant or denial would have been before this Court approximately a month before *Gilbert, Wade,* and *Stovall* were decided.

LaJoy's Petition was filed in this Court on April 7, 1967. The government sought and obtained, without objection, an extension to June 10, 1967. A further extension was allowed by Mr. Justice Clark, to July 10, 1967. This second extension was obtained on a written application by the Solicitor General stating:

> "The disposition of these cases may well be controlled by this Court's decisions in *Gilbert* v. *California,* No. 223, this Term; *Stovall* v. *Denno,* No. 254, this Term, and *United States* v. *Wade,* No. 334, this Term, to be decided shortly. Once those decisions are rendered, we will be in a position to file promptly an informed response to petitioners' claims that prejudicial error resulted from their being placed in a line-up, without the presence of attorneys to represent them, after their arrests upon indictment but before their presentment for admission to bail under Rule 9(c), F.R.Crim.P.
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> "Petitioner Tomaszck is now in Illinois custody serving a sentence for a state offense, petitioner D'Argento is, at his own election, serving his federal sentence rather than a concurrent sentence for a state offense, and petitioner LaJoy has been released on bond. There is thus no possibility of personal hardship due to incarceration in the event that petitioners' cases are carried over to the next term.
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> "The attorneys for petitioners have agreed to this extension."

It is fair to conclude that the parties and counsel for both sides did not conceive that *Stovall* v. *Denno* would deny consideration of any party's constitutional rights, due process or equal justice under law.

However, with bureaucratic imperviousness to the hardship and injustice implicit in its position, the government attempts to forestall consideration of the questions presented here, by reliance upon *Stovall* v. *Denno*, in its Brief in Opposition served on the petitioner's counsel July 12, 1967.

Stovall v. *Denno* really has little in common with the present Petition. It comes to this Court on appeal from rulings on post trial application for habeas corpus. The questions involving line-up were apparently not originally raised at trial or in appeal therefrom. The lineup occurred on August 25, 1961.

In the case at bar, the District Court had the questions presented here squarely before it. The Court of Appeals also heard these questions argued. Each denied relief improperly and contrary to the law, under *Wade* and *Gilbert*.

Whether the identification of a voice but not the person was sufficient and proper evidence on which to base conviction and sentence of fifteen years is implicit and distinguishes this case from all three line-up cases decided June 12, 1967.

III.

With regard to the matter of retrospective application of *Wade* and *Gilbert*, the Petitioner earnestly urges that his unique situation requires reconsideration of the rule of application so that justice may be done.

It is small comfort to him to know that in two out of three cases similar to his, the person denied counsel after indictment secured relief. It is less comfort to realize that government counsel secured two extensions which carried the presentation of his Petition for Certiorari beyond the chance date of June 12, 1967.

The arguments on the validity of the retroactivity are of course recent. The Petitioner would offer the following from *Estes* v. *Texas,* 381 U.S. 532, 14 L.Ed. 2d, 543:

> "It is true that in most cases involving claims of due process deprivations we require a showing of identifiable prejudice to the accused. Nevertheless, at times a procedure employed by the State involves such a probability that prejudice will result that it is deemed inherently lacking in due process. Such a case was *In re Murchison,* 349 U.S. 133, 99 L.ed. 942, 75 S.Ct. 623 (1955) where Mr. Justice Black for the Court pointed up with his usual clarity and force:
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> "[13,14] 'A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the *probability* of unfairness. . . . [T]o perform its high function in the best way 'justice must satisfy the appearance of justice.' *Offutt* v. *United States,* 348 U.S. 11, 14 [99 L.ed. 11, 16, 75 S. Ct. 11].' At 136, 99 L.ed. at 946 (Emphasis supplied.)
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> "And, as Chief Justice Taft said in *Tumey* v. *Ohio,* 273 U.S. 510, 71 L.ed. 749, 47 S.Ct. 437, 50 A.L.R. 1243, almost 30 years before: 'the requirement of due process of law in judicial procedure is not satisfied by the argument that men of the highest honor and the greatest self-sacrifice could carry it on without danger of injustice. Every procedure which would offer a *possible* temptation to the average man . . .

to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law.' At 532, 71 L. ed. at 758, 50 ALR 1243. (Emphasis supplied.)

"This rule was followed in *Rideau, supra,* and in *Turner* v. *Louisiana,* 379 U.S. 466, 13 L.ed. 2d 424, 85 S.Ct. 546 (1965). In each of these cases, the Court departed from the approach it charted in *Stroble* v. *California,* 343 U.S. 181, 96 L.ed 872, 72 S.Ct. 599 (1952), and in *Irvin* v. *Dowd,* 366 U.S. 717, 6 L.ed. 2d 751, 81 S.Ct. 1639 (1961), where we made a careful examination of the facts in order to determine whether prejudice resulted. In *Rideau* and *Turner* the Court did not stop to consider the actual effect of the practice but struck down the conviction on the ground that prejudice was inherent in it. Likewise in *Gideon* v. *Wainwright,* 372 U.S. 335, 9 L.ed. 2d 799, 83 S.Ct. 792, 93 ALR 2d 733 (1963), and *White* v. *Maryland,* 373 U.S. 59, 10 L.ed 2d 193, 83 S.Ct. 1050 (1963), we applied the same rule, although in different contexts." 381 U.S. 542, 543, 544.

The burden of reconciling a denial of certiorari in this case with appearance of justice, to a man whose sentence of fifteen years depends on a chance date which in effect marks the only difference between lawful and unlawful, constitutional and unconstitutional, fair and unfair, is beyond the ability of his counsel.

CONCLUSION

The Petitioner requests the grant of the Writ of Certiorari as prayed in his Petition.

Respectfully submitted,

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Attorney for Petitioner